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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1967~~ 114

PATRICK SCHANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Patrick Schang respectfully prays that a writ of certiorari issue to review the judgment of the Seventh Circuit entered in the above case on January 5, 1967.

OPINION BELOW.

The opinion of the Court below (Appendix A, page 7) is not yet reported. The District Court did not write or hand down any opinion.

JURISDICTION.

The judgment of the Court below was entered on January 5, 1967 (Appendix A, p. 7). Petition for rehearing by the petitioner was denied on March 8, 1967 (Appendix B, p. 20).

Counsel for petitioner represents to the Court that a Motion to extend time within which to file Petition for Writ of Certiorari, addressed to the Honorable Tom C. Clark, was deposited in the Elgin, Illinois post office at 8:35 A. M., April 8, 1967, with air mail, special delivery stamps affixed; that Elgin is approximately 20 miles from O'Hare Airport and air mail is sent by truck direct to the airport; that in the usual course of business this petition should have reached the Supreme Court building before midnight of the same day; that counsel has been informed by the Clerk of the Supreme Court that said petition was delivered at 7:25 P. M., on Sunday, April 9, 1967.

Petitioner prays this Court to waive its rules and consider this petition on its merits. The jurisdiction of the Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED.

Whether the denial of Patrick Schang's Motion for a severance and the denial of the Motion for a judgment of acquittal at the close of the Government's case as to co-defendant, Jean Schang, wife of petitioner (who was acquitted by the jury), prejudiced the constitutional rights of Patrick Schang.

STATEMENT OF THE CASE.

This is the Petition for Certiorari by Patrick Schang seeking review of the affirmance of a judgment on a verdict of guilty by a jury and a sentence of fifteen years imprisonment upon an indictment charging bank robbery and putting in jeopardy the lives of employees and customers by use of a dangerous weapon, to-wit, a firearm (Tr. 5).

Because of lack of funds to print the record, the Court of Appeals ordered that the parties could proceed on the official transcript and record of the District Court.

Petitioner states the evidence as it was described by the Government Brief in the Court of Appeals, pages 72-75. This evidence relates to Jean Schang and the version of the Government as to these events is adopted to avoid argument on the facts and because of the inability to print the testimony. The three co-defendants in this case have already filed with this Court the original transcript and record and this petitioner adopts this transcript and record.

REASONS FOR GRANTING THE WRIT.

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit, in this case for the following reasons:

1. Petitioner and his co-defendant and wife, Jean Schang, both made motions for severance and for separate trial in writing and said motions were denied. The denial of said motions deprived petitioner of due process and a fair trial. Severance should have been granted.

2. At the close of the Government's case and again at the close of all the evidence, motions for judgment of acquittal were made in behalf of the co-defendant and wife, Jean Schang. The motion at the close of the Government's case was denied but the Court took under advisement the motion at the close of all the evidence. It is the position of Patrick Schang that the motion should have been granted, as a matter of law, as to his wife thereby permitting him to call her as an untainted, unindicted witness.

ARGUMENT.

The Court of Appeals for the Seventh Circuit, in its opinion in this case, disposed of the contentions of petitioner in the following language:

"The defendants have raised additional questions which we have carefully considered. We think these contentions are without merit and do not warrant further detailed discussion."

At the close of the Government's case Jean Schang rested her case and offered no evidence contending that the evidence against her was so basically insufficient as to require the trial judge to grant a motion of acquittal upon her behalf. The Court's failure to grant her motion of acquittal deprived her husband, Patrick Schang, of the right to call her as a witness untainted by the facts of an indictment. The evidence against Jean Schang was practically non-existent. The weakness of this evidence was recognized by the jury by their acquittal of her.

Argument was made to the trial court relative to the prejudice that would inure to Patrick Schang by being deprived of the right to call his wife as a witness unencumbered by an indictment and that she should be judged acquitted or severed from the case. Credibility of a witness before a jury was the issue at stake.

When a motion for acquittal is made, it is the duty of the trial judge in passing upon it to determine if upon such evidence, giving full play to the right of the jury to determine credibility, weigh such evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *Curley* v. *United States*, 160 F. 2d 229. If the trial judge concludes

that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion.

It is the position of the petitioner that as a matter of law a judgment of acquittal should have been granted as to his wife, Jean Schang. He was entitled to have the right to present Jean Schang, if he decided so to do, free of contamination of an indictment over her. He is deprived of due process of law if she is entitled to the granting of the motion. By reserving a ruling on the motion the stigma of the indictment was kept over her. The possible testimony of Jean Schang might have been accepted by the jury without the shadow and cloud of the indictment over her.

CONCLUSION.

Wherefore, this petitioner prays this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

EUGENE T. DEVITT,
Attorney for Petitioner.